Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1446

In The

Supreme Court of the United States

October Term, 1993

RENATE CRETAN (Widow of JOHN CRETAN), et al.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, and BETHLEHEM STEEL CORPORATION,

Respondents.

Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May the dependents of a terminally ill maritime employee avoid the credit and benefit forfeiture provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA") by settling their third-party civil actions before rather than after the employee's death?

LIST OF PARTIES

The parties to the proceeding whose judgment is sought to be reviewed are:

Renate Cretan, Widow of John Cretan

Nicole Cretan, Daughter of John Cretan

Bethlehem Steel Corporation[1]

Director, Office of Workers' Compensation Programs

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[1] The following subsidiaries of Bethlehem are identified in accordance with Rules 24.1 and 29.1 of this Court: Chiles-Alexander International Inc.; Double G Coatings Company, L.P.; Double G Coatings, Inc.; Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.; G&A Limited Partnership III – A; Griffin-Alexander International, Inc.; India Offshore Inc.; Indiana Pickling and Processing Company; Iron Ore Company of Canada; CENTEC Company; Presque Isle Corporation; Seadrill, Inc.; Walbridge Coatings; Rig V Limited Partnership; Ontario Iron Company; Rig VI Limited Partnership; and Bethlehem Singapore Private Limited.

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BRIEF IN OPPOSITION

Respondent Bethlehem Steel Corporation ("Bethlehem") respectfully requests this Court to deny the Writ of Certiorari sought by Petitioners Renate and Nicole Cretan.

I.

STATEMENT OF THE CASE

Over 40 years following his exposure to asbestos during World War II era shipbuilding employment with Bethlehem, John Cretan developed terminal mesothelioma. He filed a claim for LHWCA benefits and,

together with his wife and daughter, brought civil actions against a number of asbestos manufacturers. Shortly before John Cretan's death, he and Petitioners entered into settlement agreements with the civil defendants which assured a minimum recovery of $790,000. (Benefits Review Board Opinion, p. 2; Pet. App.) Six weeks following John Cretan's death, Petitioners filed their own claims to LHWCA benefits.

Petitioners argued that they were subject to *neither* the credit *nor* the forfeiture provisions of Sections 33(f) and (g), claiming that they were entitled to retain both the compensation and civil recoveries without offset. Applying the approach rejected by this Court in *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), the Administrative Law Judge and the Benefits Review Board agreed that Petitioners were not subject to Section 33(g) forfeiture but determined that Section 33(f) credits were available to Bethlehem.

The Court of Appeals for the Ninth Circuit concluded that lower agencies' attribution of differing meanings to the phrase "person entitled to compensation" in the credit and forfeiture contexts was improper, agreed with Petitioners that the phrase required an identical definition in both statutory subsections, and determined that both Petitioners were persons "entitled to compensation" subject to the provisions of Section 33(f) and (g).

> Thus, in accordance with our ruling regarding section 33(f), we hold that the Cretans are persons 'entitled to compensation' within the meaning of section 33(g). As we earlier explained, this holding, when combined with our ruling on section 33(f), defeats recovery for the Cretans under LHWCA: if their tort settlement was less than their statutory entitlement, they are barred by section 33(g); if the recovery exceeded their statutory entitlement, Bethlehem is entitled to set off its entire statutory liability under section 33(f).

Cretan v. Bethlehem Steel Corp., 1 F.3d 843, 848 (9th Cir. 1993).

II.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. The Petition Misstates The Administrative Position. The Director Did Not Request Deference.

Petitioners repeatedly state that the Court of Appeals for the Ninth Circuit improperly refused the Director's request that deference be extended to its counsel's argument that neither 33(f) nor 33(g) applied to this factual situation. The Director, however, specifically disavowed any claim to the traditional "deference" granted an administrative construction of the LHWCA.

> [T]he Director does not urge the Court to defer to his present position on these two points, but merely points out that his *former* construction

> can no longer be deferred to, given his abandonment of it in view of *Cowart*.

Director's Brief, p. 14.

Indeed, any claim to deference would have been surprising. The Director – the administrative official charged with implementing Congress's plan – expressly conceded that the forfeiture and credit provisions were intended by Congress to be applicable to *all* third-party recoveries.

> Here again, the Director agrees generally with the perception on which Bethlehem relies: that the underlying general purpose and plan of Section 33(f)-(g) apply to all proceeds of claimants' causes of action for compensable injuries or deaths, regardless of how (with or without instituting proceedings) or when (before or after the cause of action or the entitlement to compensation has arisen, accrued, vested, or been recognized in a formal order) the tortfeasor is ordered or agrees to pay those proceeds.

Director's Brief, p. 29.

B. The Petition Mischaracterizes *Cowart*.

The Petition not only misstates the facts relating to the deference issue, it also wildly mischaracterizes this Court's opinion in *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

Cowart does *not* hold that civil settlements entered into by the wife and dependent child of a terminally ill claimant to LHWCA benefits become subject to Sections 33(f) and (g) only when concluded after the former

worker's death. Instead, *Cowart* held only that the phrase "person entitled to compensation" was *not* limited to persons actually receiving LHWCA benefits at the time of the civil settlement. With that holding, this Court affirmed an *en banc* ruling of the United States Court of Appeals for the Fifth Circuit generally concluding that there were *no* exceptions to Congress's scheme for protecting the employer's interests. *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 830 (5th Cir. *en banc* 1991).

Petitioners' efforts to distort this Court's closure of the only previously recognized exception to the applicability of Sections 33(f) and (g) into a wide detour around Congress's planned protection of employers' interests should be rebuffed.

Quite obviously, the effects of this Court's opinion in *Cowart* are not limited to its holding. The opinion clearly requires that the term "person entitled to compensation" receive the same construction in both the credit and forfeiture contexts. The opinion squarely confirms that a definition restricting "entitled to compensation" status to only those actually receiving LHWCA benefits makes no sense when applied to Section 33(f)'s credit mechanism. *Cowart*, ___ U.S. ___, 112 S.Ct. at 2596. The Ninth Circuit's opinion in this proceeding is fully consistent with these portions of the opinion.

The Ninth Circuit did, however, decline to give "binding effect" to the language in *Cowart* focusing upon the "moment [a] right to recovery vested." *Cowart*, ___ U.S. ___, 112 S.Ct. at 2595. This language – the sole basis for Petitioners' argument that they were not subject to Sections 33(f) and (g) because their settlements preceded

Mr. Cretan's death – was properly recognized to be dicta and not given binding effect by the Ninth Circuit.

> It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a 'person entitled to compensation.'
>
> * * *
>
> There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. *See United States v. Ordonez*, 737 F.2d 793, 803 n.1 (9th Cir. 1984) (discussing uses of dictum).

Cretan, supra, 1 F.3d at 847.

C. The Ninth Circuit's Opinion Creates No "Catch 22."

The third major factual misstatement repeated throughout the Petition is the claim that the Ninth Circuit opinion somehow forces claimants to LHWCA benefits to enter into improvident civil settlements. This is nonsense. Even if the settlements entered into by Petitioners are considered improvident, the decision to accept the $790,000 was theirs, unforced by Bethlehem.

A decision to proceed to civil judgment would have assured continued LHWCA benefit rights. Only an unapproved settlement for an amount *less than* the value of the LHWCA entitlement or a failure to provide timely notice of a civil judgment gives rise to forfeiture. *Cowart*, ___ U.S. ___, 112 S.Ct. at 2598.

The LHWCA was not designed to encourage the prosecution of civil actions and settlements for less than the amounts available through the Act itself. If Petitioners indeed accepted from the civil defendants amounts less than those otherwise assured them by the LHWCA, they either strongly preferred the lump-sum payment alternative which only the civil settlements provided, were ill-advised, or despite known risks attempted to gain a true double recovery. Petitioners have advanced no justification for their attempt to retain both the civil proceeds and the LHWCA benefits they now seek.

III.

CONCLUSION

The Ninth Circuit's opinion was wholly consistent with Congress's intent. It deviates not at all from *Cowart*'s holding. It comports with the approach to Section 33 adopted by the United States Court of Appeals for the Fifth Circuit and is at odds with no other published opinion. The Petition for Certiorari should be denied.

DATED: April 11, 1994.

Respectfully submitted,

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